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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 IN RE: VOLKSWAGEN “CLEAN  
9 DIESEL” MARKETING, SALES  
10 PRACTICES, AND PRODUCTS  
11 LIABILITY LITIGATION

MDL No. 2672 CRB

**ORDER ON DEFENDANT’S  
MOTION TO EXCLUDE  
ARGUMENTS REGARDING  
EMISSIONS OTHER THAN NOX**

12 This Document Relates to:

13 Salt Lake County v. Volkswagen Group  
14 of America, Inc. et al., No. 16-cv-5649

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16 In the above-captioned MDL, the Environmental Protection Commission of  
17 Hillsborough County, Florida and Salt Lake County, Utah (collectively, the “Counties”)  
18 contend that Defendants’ post-sale software update violated the anti-tampering regulations  
19 of Hillsborough County and Utah, respectively. See Rules of Env’t Prot. Comm’n of  
20 Hillsborough Cnty. (EPC), Rule 1-8.05(1), (6); Utah Admin. Code § R307-201-4.

21 In July, the Court stated that “the next issue to be resolved is whether the post-sale  
22 software modification in this case violated the Counties’ regulations by increasing vehicle  
23 emissions relative to emissions before the modification,” and ordered the parties to  
24 conduct discovery on the “net emissions effect of post-sale software.” See Order re:  
25 Software Divisibility and Schedule for Further Discovery and Briefing (dkt. 8003). On  
26 July 22, 2022, Defendants (hereinafter “Volkswagen”) filed their motion for partial  
27 summary judgment, arguing, in essence, that they are entitled to summary judgment  
28 because the replacement software installed in the affected vehicles reduced NO<sub>x</sub> emissions.

1 Mot. for Partial Summ. J. (dkt. 8010).

2 On September 6, 2022, the EPC of Hillsborough County, Florida filed its opposition  
3 to Volkswagen's motion, and on September 7, Salt Lake County filed its own opposition.  
4 (dkts. 8039, 8041). The Counties argued that whether the software updates reduced NO<sub>x</sub>  
5 emissions is immaterial to violations of the claims at issue, and even if reductions in  
6 emissions are required for such claims, then the Counties should be granted additional  
7 discovery into "the net effect as to all emissions," EPC Opp'n to Mot. for Summ. J. (dkt.  
8 8039) at 18, including "[o]ther air pollutants." SLC Opp'n to Mot. for Summ. J. (Dkt.  
9 8041) at 6.

10 On September 13, in lieu of a reply, Volkswagen filed a motion to exclude  
11 arguments regarding emissions other than NO<sub>x</sub>, in part because "these cases are, and have  
12 always been, about NO<sub>x</sub>," and moved for an extension of time to file its reply to its initial  
13 motion for partial summary judgment. Mot. to Exclude (dkt. 8044) at 8–9. On September  
14 21, 2022, the Counties filed their oppositions to Volkswagen's new motion. (dkts. 8049,  
15 8052). On October 4, 2022, Volkswagen filed its reply to its September 13 motion. (dkt.  
16 8066).

17 At issue is Volkswagen's motion to exclude, which seeks "an order that the  
18 Counties may not transform this nearly seven-year-old action, which has always been  
19 about NO<sub>x</sub> emissions, into a fishing expedition about other emissions, and (ii) an extension  
20 of all current deadlines associated with Defendants' pending motion for partial summary  
21 judgment . . . until the Court has decided this issue." Mot. to Exclude (dkt. 8044) at 1.

22 The Court finds that the Counties have not pled that Volkswagen was responsible  
23 for any excess emissions other than NO<sub>x</sub>, which preclude their arguments regarding other  
24 emissions in opposition to summary judgment. However, mindful of Ninth Circuit  
25 precedent on this issue, the Court **ORDERS** the Counties to inform the Court whether they  
26 seek to move to amend their complaints to include allegations of excess emissions other  
27 than NO<sub>x</sub>. If so, the Counties shall so move and file proposed amended complaints by  
28 **October 28, 2022**. If the Counties seek to move to amend their complaints, the Court will

order briefing on that motion. If the Counties do not seek to move to amend their complaints, the Court will set new deadlines for summary judgment briefing.

### **I. LEGAL STANDARD**

Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Pickern v. Pier 1 Imports (U.S.), Inc., 457 F.3d 963, 968 (9th Cir. 2006) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002)). It is thus “improper” “to advance . . . new theories for the first time in . . . opposition to summary judgment,” Ray v. State Farm Mut. Auto. Ins. Co., No. 20-55989, 2021 WL 4902357, at \*1 (9th Cir. Oct. 21, 2021), since “summary judgment is not a procedural second chance to flesh out inadequate pleadings.” Wasco Prod., Inc. v. Southwall Techs., Inc., 435 F.3d 989, 992 (9th Cir. 2006) (internal quotation marks and citation omitted).

Where a party has made arguments in an opposition to summary judgment that are outside the scope of the complaint, the Ninth Circuit has previously instructed courts to “construe[]” such an argument as a request “to amend the pleadings out of time.” Desertrain v. City of Los Angeles, 754 F.3d 1147, 1154 (9th Cir. 2014) (quoting Apache Survival Coal. v. United States, 21 F.3d 895, 910 (9th Cir. 1994)). However, a court need not construe a new argument in opposition to summary judgment as a request to amend a party’s complaint if the party does not seek to amend or otherwise indicates that it wishes to stand on the existing complaint for purposes of the current motion. See Hilliard v. Murphy Land Co., 835 F. App’x 292, 293 (9th Cir. 2021); Berrellez v. Pontoon Sols., Inc., 775 F. App’x 357, 358 (9th Cir. 2019). Neither of the Counties’ oppositions to Volkswagen’s pending motions seek to move to amend their complaints.

### **II. DISCUSSION**

Volkswagen is correct that both Counties’ complaints do not provide fair notice of allegations of increased emissions beyond NO<sub>x</sub> emissions, as required by Federal Rule of Civil Procedure 8.

Salt Lake County’s Third Amended Complaint contains only bare allegations of

1 heightened emissions of “other pollutants” in addition to NO<sub>x</sub>, without specifying what  
 2 those other pollutants are or how Volkswagen’s post-sale software update affected the  
 3 emission of those pollutants. See, e.g., SLC TAC (dkt. 4456) ¶¶ 2, 3, 4, 7, 40. Salt Lake  
 4 County’s argument that its allegation about “particle pollution”—that it “can be directly  
 5 emitted, or it can be formed when emissions of NO<sub>x</sub>, sulfur oxides (SO<sub>x</sub>), ammonia,  
 6 organic compounds, and other gases react in the atmosphere”—is itself an allegation of  
 7 excess emissions of other pollutants is unpersuasive. Dkt. 8049 at 4. That paragraph, when  
 8 read in the context of the complaint, seems intended to buttress the harm underlying the  
 9 allegation that Volkswagen emitted “as much as 40 times more NO<sub>x</sub> than what is permitted  
 10 by federal regulation.” Id. ¶¶ 5, 9. It is not an independent allegation of excess emissions  
 11 of other pollutants.

12 Hillsborough County’s First Amended Complaint fares no better. Hillsborough  
 13 County argues that a paragraph describing a general “trade-off between NO<sub>x</sub> and  
 14 [particulate matter] PM” that occurs in every diesel engine is enough to plausibly plead  
 15 excess PM emissions due to the software modification. Dkt. 8052 at 7; EPC FAC (dkt.  
 16 4457) ¶ 26. But Volkswagen is correct that such a statement, by itself, does not allege  
 17 excess PM emissions, dkt. 8066 at 2, and thus does not give Volkswagen adequate notice  
 18 of a claim of excess emissions beyond NO<sub>x</sub>. Pickern, 457 F.3d at 969 (concluding that  
 19 providing “hypothetical” allegations in a complaint “is not a substitute for investigating  
 20 and alleging the grounds for a claim”).

21 Because the Counties’ complaints fail to allege excess emissions of any pollutant  
 22 but NO<sub>x</sub>, the Counties are not entitled to oppose summary judgment on the basis of excess  
 23 emissions of other pollutants, or seek additional discovery under Federal Rule of Civil  
 24 Procedure 56(d) on that basis. However, because Desertrain instructs that courts should  
 25 construe arguments like those the Counties’ put forth in their oppositions as requests to  
 26 amend their complaints, the Court will give the Counties the opportunity to so move. If the  
 27 Counties choose to do so, any motion should explain why they should be entitled to amend  
 28 their complaints at this late stage.

**III. CONCLUSION**

For the foregoing reasons, the Court ORDERS the Counties to inform the Court whether they seek to move to amend their complaints to include allegations of excess emissions other than NO<sub>x</sub>. If so, the Counties shall so move and file proposed amended complaints by **October 28, 2022**. If the Counties seek to move to amend their complaints, the Court will order briefing on that motion. If the Counties do not seek to move to amend their complaints, the Court will set new deadlines for summary judgment briefing. In light of this order, the Court VACATES the forthcoming October 21 hearing.

**IT IS SO ORDERED.**

Dated: October 14, 2022



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CHARLES R. BREYER  
United States District Judge